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September 11, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 3, 2006

Case Number: TSO-0443

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxxxx (the individual) for access authorization 1/ under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." Based on the record before me, I have determined that the individual's access authorization should not be granted.

I. Background

The individual is employed at a DOE facility where his work requires him to have an access authorization. The local DOE security office denied the individual's request for a security clearance for reasons described in a Notification Letter issued to the individual on July 26, 2006. The Notification Letter alleges under 10 C.F.R. § 710.8(f) that the individual has "deliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive National Security Positions." It also alleges that the individual has been or is a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist as alcohol dependent or as suffering from alcohol abuse. 10 C.F.R. § 710.8(j).

The security concerns in the Notification Letter are based on the following factual allegations. In a personnel security interview (PSI), the individual falsified significant information about his use of illegal drugs. In addition, during this PSI, the individual stated that he consumes a six-pack of beer on both Friday and Saturday nights, three weekends each month, and becomes intoxicated each time. *See* Notification Letter. He also admitted that he drives after consuming a six-pack of beer in an intoxicated state, three times a month. *Id.* In 2004, the individual was arrested and charged with Careless Driving by Straddling and by Swerving Across the Marked Lanes of Traffic. *Id.* The individual failed a field sobriety test and admitted that he had been drinking prior to the incident. *Id.* Because of these security concerns, the case was referred for administrative review. The

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

individual filed a request for a hearing on the concerns raised in the Notification Letter. DOE transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case.

At the hearing that I convened, the DOE Counsel elected to call one witness, a DOE Personnel Security Specialist. The individual called two witnesses, a senior security specialist employed where the individual works and his mother. The DOE submitted a number of written exhibits prior to the hearing.

II. Standard of Review

The hearing officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

When reliable information reasonably tends to establish the validity and significance of substantially derogatory information or facts about an individual, a question is created as to the individual's eligibility for an access authorization. 10 C.F.R. § 710.9(a). The individual must then resolve that question by convincing the DOE that granting his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). In the present case, the individual has not convinced me that granting his security clearance would not endanger the common defense and would clearly be in the national interest.

III. Findings of Fact

On October 4, 2004, the individual signed a Questionnaire for National Security Positions (QNSP) certifying that in the last seven years he had not illegally used or purchased a controlled substance. He also certified that he had never been charged with or convicted of any offense related to drugs. However, during a PSI conducted on March 23, 2006, the individual admitted that he used and purchased marijuana from 1999 to 2003, and that he was arrested and charged with Possession of Marijuana in June 2000. Specifically, when questioned during his March 23, 2006 PSI, the individual admitted that he had been arrested for drug possession and that he used marijuana while

in high school in 1999 to 2002, and one other time after high school in 2003. With respect to his arrest for drug possession in 2000, the individual explained during his interview that he was informed by the courts that if he completed his terms of release after the arrest, the charge would be removed from his record because he was 16 years old when it occurred. The individual stated that he believed that the charge had been completely removed from his record. During this PSI, the individual also admitted that he did not intend to report his past involvement with illegal drugs unless he was confronted with the information.

In addition to these falsification issues, issues regarding the individual's alcohol consumption raised security concerns. The individual first began drinking alcohol while in high school around the age of 16, usually in a social setting with friends at parties. Since high school, the individual stated that he currently consumes a "six-pack of beer on both Friday and Saturday nights, three weekends each month, and becomes intoxicated each time." DOE Exhibit 8. He admitted that he drives after consuming a six-pack of beer in an intoxicated state, three times a month.

On December 5, 2004, the individual was arrested and charged with Careless Driving by Straddling and by Swerving Across the Marked Lanes of Traffic. According to the individual, he was driving down a "curvy" road. He came to a stop light and was asked to pull over by the police. When asked whether he had been drinking, the individual admitted that he had consumed one 12 ounce bottle of beer earlier that day about 45 minutes before he decided to drive. The individual failed a field sobriety test and was arrested because the officer thought he was drunk. However, the individual did not test positive for Driving Under the Influence (DUI) when he was given a Breathalyzer test. The individual was not charged with DUI and was issued a citation for Reckless Driving/No Insurance. He was released on a \$200 bond. The individual was later found guilty of Reckless Driving and paid a fine of less than \$120. After providing proof of insurance, that charge was dismissed and no other penalties were assessed. DOE Exhibit 2.

IV. Analysis

A. Security Concerns Cited Under 10 C.F.R. § 710.8(f)

False statements or misrepresentations by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when an access authorization holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995)(affirmed by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, *Personnel Security Review*, 27 DOE ¶ 83,030 (2000) (*terminated* by OSA, 2000). This security concern applies, however, only to misstatements that are "deliberate" and involve "significant" information. 10 C.F.R. § 710.8(f) (Criterion F). Based on the record before me, I find that the individual deliberately misrepresented significant information during his PSI. Consequently, DOE properly invoked Criterion F when it denied the individual's request for access authorization.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing* (Case No. VSO-0244), 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff'd*, *Personnel Security Review* (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). Cases involving verified falsifications or misrepresentations are nonetheless difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from lying nor security programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statement and the individual's subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether granting the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd*, *Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (affirmed by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 (2001). In the end, as a Hearing Officer, I must exercise my common sense judgment whether the individual's access authorization should be granted after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c).

B. Mitigation of Criterion F Concerns

The key issue in this case is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual's misrepresentations was serious. The individual's lack of candor concerning an area of his life that could increase his vulnerability to coercion or blackmail raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful; this important principle underlies the criterion set forth in 10 C.F.R. § 710.8(f). This principle has been consistently recognized by DOE Hearing Officers. *See, e.g., Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999).

The individual acknowledges that he did not accurately answer his 2004 QNSP regarding his past use of illegal drugs. However, he states that he had never completed a security questionnaire of that nature before and was confused by the questions. Transcript (Tr.) of Personnel Security Hearing at 167. The individual asserted that his marijuana offense occurred when he was 16 years old and it was adjudicated in a juvenile court. *See Individual's Legal Arguments and Conclusions* at 1. He indicated that he completed one year of probation in which he was monitored and submitted to several drug tests which were all negative. The individual further stated that he completed all the requirements of his probation and was released from the juvenile court's jurisdiction. *Id.*, Tr. at 166. According to the individual, he answered the QNSP negatively regarding his past use of illegal drugs because he did not believe the juvenile charge was on his record. *Id.* During the hearing, the individual also asserted that he sought the advice of an older cousin in completing his QNSP. *Id.* at 164. He stated that his cousin advised him to answer "no" to the drug use questions since he did not currently smoke marijuana. The individual reiterated that he believed that the juvenile court proceeding was no longer a part of his record. *Id.* at 166. He further testified that he now completely

understands the importance of answering the QNSPs as accurately and truthfully as possible. *Id.* at 171.

A senior security specialist, who works for the DOE facility where the individual works, testified on behalf of the individual. She stated that she has worked in the courthouse and is familiar with the disposition of juvenile cases. Tr. at 131. According to the security specialist, when individuals go to court in a juvenile matter, they are told that “these records will be sealed to the public and they are juvenile cases . . . the judges don’t know, don’t have the foresight to say, but if you ever apply for a security clearance, you have to divulge it.” Tr. at 132. The security specialist further testified that she believes this is why the individual did not reveal his marijuana offense on his QNSP. She further stated that she would have explained to the individual that he had to include the juvenile offense if she had been conducting security interviews with applicants as she is doing now. *Id.* at 132-133. The security specialist stated that she only started conducting security interviews two years ago, so she was not able to talk to the individual at the time he was an applicant for an access authorization. She testified that the individual is a very honest, reliable and conscientious employee. *Id.* at 117.

After reviewing the evidence in the record and assessing the credibility of the individual’s testimony at the hearing, I conclude that the individual has not mitigated the security concerns arising from his falsification on the 2004 QNSP. With regard to the individual’s concealment of his juvenile drug offense, the individual persuaded me that he failed to reveal this matter on his 2004 QNSP because he thought his juvenile court record had been sealed. As for the individual’s concealment of his 1999 through 2003 drug usage, however, I find that the individual failed to present any credible explanation for his deliberate omission of this drug usage on his QNSP. Accordingly, I cannot find at this time that the individual has mitigated the security concerns raised by Criterion F.

C. Security Concerns Cited Under 10 C.F.R. § 710.8(j)

The Notification Letter states that the individual “has been, or is a user of alcohol habitually to excess” See 10 C.F.R. § 710.8(j). It refers to the individual’s statements in his March 23, 2006 PSI in which he stated that he currently consumes a six-pack of beer on both Friday and Saturday nights, three weekends each month, and becomes intoxicated each time. It also refers to the individual’s 2004 arrest and charge for Careless Driving by Straddling and by Swerving Across the Marked Lanes of Traffic in which the individual failed a field sobriety test and admitted that he had been drinking prior to the incident.

This derogatory information creates serious security concerns about the individual. In other DOE security clearance proceedings, hearing officers have consistently found that using alcohol habitually to excess raises important security concerns. See, e.g., *Personnel Security Hearing* (Case No. VSO-0079, 25 DOE ¶ 82,803 (1996)(affirmed by OSA, 1996); *Personnel Security Hearing* (Case No. VSO-0042), 25 DOE ¶ 82,771 (1995)(affirmed by OSA, 1996); *Personnel Security Hearing* (Case No. VSO-0014), *aff’d Personnel Security Review*, 25 DOE ¶ 83.002 (1995)(affirmed by OSA, 1995). In this case the risk is that the individual’s excessive use of alcohol might impair his judgment and reliability to the point that he will fail to safeguard classified matter or special nuclear material. See

Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005 Memorandum for William Leonard, Director, Information Security Oversight Office). I therefore find that the DOE properly invoked Criterion J when it denied the individual's request for access authorization.

Since there is reliable derogatory information that creates substantial doubt concerning the individual's eligibility for access authorization, I need only consider whether the individual has made a showing of mitigating facts and circumstances sufficient to overcome the DOE's concerns under Criterion J.

D. Mitigation of Criterion J Concerns

The individual maintains that his 2006 PSI did not accurately reflect his drinking habits and that he was confused by the questions about his alcohol use during the interview. He also maintains that his answers to the questions about his alcohol use were misinterpreted by the Personnel Security Specialist. He testified to the following:

The way the conversation was going about the alcohol . . . she was asking me like how many weekends might I drink and what might I purchase like as far as getting drinks. And like most stores, you can't buy beer without getting like a six-pack or so. And I said probably about a six-pack of beer. And as far as the conversation was going, it might be nights . . . I get off on Friday nights, I might go home and drink, have about a couple of beers and go to sleep, because I get home like say about 12:00 . . . And then Saturday mornings, I either got to get up and do something like for family . . . I said it was three weekends out of a month because she kept asking me questions like as far as just . . . just put a time bracket . . . I really wasn't understanding, but I was like, 'Yeah, okay.' And said I might drink probably tonight, and then tomorrow I wake up and got to do things, and I might drink Friday night, but I wasn't saying that I consume a six-pack every time I drink . . .

Tr. at 174.

The individual further testified that he only drinks occasionally. *Id.* at 176. He testified that his alcohol consumption has changed significantly since his 2004 PSI because he takes care of his young daughter more often on weekends now. He stated that the last time he drank alcohol, it was on a special occasion, a play-off game over a month ago. The individual further stated that on this occasion he probably drank three or four beers but that he did not drive afterward. *Id.* at 179. Finally, the individual testified that he has never been cited for any alcohol related offense. He stated that he was not drinking and driving when he was arrested and charged with Careless Driving by Straddling and by Swerving Across the Marked Lanes of Traffic. *Id.* at 184. The individual reiterated that he does not abuse alcohol and has never had any problems with work or family due to his alcohol consumption. *Id.*

While this proceeding was pending and approximately two weeks after the hearing, DOE Security submitted an Incident Report regarding a recent arrest involving the individual. According to this Incident Report, the individual was arrested and cited with two charges: 1) Failed to Drive Within Right Lane of Highway Having Two or More Lanes of Traffic in Same Direction, and 2) Operated Motor Vehicle While in An Intoxicated Condition. The Incident Report further reported that the individual had consumed three beers at home before arriving at a party where he consumed another three beers and two shots of whiskey. After leaving a bar at 2:00 am, the individual was stopped by police and administered a BAC which the individual believes read .19. The Incident Report also stated that the individual failed the "hopping on one foot test." According to the Incident Report, the individual was arrested and taken to the Sheriff's Department. It is not known what the final disposition of this arrest is.

After listening to the testimony at the hearing regarding the individual's drinking habits, it appeared that the individual's alcohol consumption was not excessive and that he is a moderate drinker at most. However, the individual's most recent arrest and charge have cast doubt on his credibility with respect to his professed alcohol moderation. Because it is unclear how much alcohol the individual consumes, I cannot find that the individual has mitigated the security concerns associated with his use of alcohol at this time.

III. Conclusion

As explained in this Decision, I find that the DOE properly invoked 10 C.F.R. § 710.8(f) and (j) in denying the individual's access authorization. The individual has not presented adequate mitigating factors that would alleviate the legitimate security concerns of the DOE Operations Office with respect to Criteria F and J. In view of these criteria and the record before me, I find that the individual has not demonstrated that granting his access authorization would not endanger the common defense and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be denied. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: September 11, 2007

